



## **DEPARTMENT OF LABOR**

### **Employment and Training Administration**

#### **Labor Certification Process for the Temporary Employment of Foreign Workers in Agriculture in the United States: Adverse Effect Wage Rate Updates for Non-Range Occupations**

**AGENCY:** Employment and Training Administration, Department of Labor.

**ACTION:** Notice.

**SUMMARY:** The Employment and Training Administration of the Department of Labor (DOL) is issuing this notice to announce updates to the Adverse Effect Wage Rates (AEWR) for the employment of temporary or seasonal nonimmigrant foreign workers (H-2A workers) to perform agricultural labor or services other than the herding or production of livestock on the range. AEWRs are the minimum wage rates DOL has determined must be offered, advertised in recruitment, and paid by employers to H-2A workers and workers in corresponding employment so that the wages and working conditions of workers in the United States (U.S.) similarly employed will not be adversely affected. In this notice, DOL announces the AEWRs based on wage data reported by DOL's Bureau of Labor Statistics (BLS) Occupational Employment and Wage Statistics (OEWS) survey. The AEWRs established in this notice are applicable to H-2A job opportunities classified: in Standard Occupational Classification (SOC) codes other than the six SOC codes comprising the field and livestock workers (combined) group, and in the field and livestock workers (combined) occupational group that are located in States or regions, or equivalent districts or territories, for which the United States Department of Agriculture's Farm Labor Report (better known as the Farm Labor Survey, or FLS) does not report a wage.

**DATES:** These rates are effective July 1, 2023.

**FOR FURTHER INFORMATION CONTACT:** Brian Pasternak, Administrator, Office of Foreign Labor Certification, Employment and Training Administration, U.S. Department of

Labor, 200 Constitution Avenue, NW, Room N-5311, Washington, DC 20210, telephone: (202) 693-8200 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone numbers above via TTY/TDD by calling the toll-free Federal Information Relay Service at 1 (877) 889-5627.

#### **SUPPLEMENTARY INFORMATION:**

The U.S. Citizenship and Immigration Services of the Department of Homeland Security will not approve an employer's petition for the admission of H-2A nonimmigrant temporary and seasonal agricultural workers in the U.S. unless the petitioner has received an H-2A labor certification from DOL. DOL issues such labor certification when it determines that: (1) there are not sufficient U.S. workers who are able, willing, and qualified and who will be available at the time and place needed to perform the labor or services involved in the petition; and (2) the employment of the foreign worker(s) in such labor or services will not adversely affect the wages and working conditions of workers in the U.S. similarly employed. *See* 8 U.S.C.

1101(a)(15)(H)(ii)(a), 1184(c)(1), and 1188(a); 8 CFR 214.2(h)(5); 20 CFR 655.100.

DOL's H-2A regulations at 20 CFR 655.122(l) provide that employers must pay their H-2A workers in non-range occupations<sup>1</sup> and workers in corresponding employment at least the highest of: (i) the AEWR; (ii) a prevailing wage rate if the Office of Foreign Labor Certification (OFLC) Administrator has approved a prevailing wage survey for the applicable crop activity or agricultural activity and, if applicable, a distinct work task or tasks performed in that activity; (iii) the agreed-upon collective bargaining wage rate; (iv) the Federal minimum wage rate; or (v) the State minimum wage rate, whichever is highest, for every hour or portion thereof worked during a pay period. Further, when the AEWR is updated during a work contract, the employer must pay at least that updated AEWR upon the effective date of the new rate, if the updated AEWR is higher than the highest of the previous AEWR, a prevailing rate for the crop activity or

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<sup>1</sup> Range occupations (*i.e.*, herding and production of livestock on the range) are subject to 20 CFR 655.200 through 655.235, which include a wage obligation provision at 20 CFR 655.210(g) and a minimum monthly AEWR at 20 CFR 655.211.

agricultural activity and, if applicable, a distinct work task or tasks performed in that activity and geographic area, the agreed-upon collective bargaining wage, the Federal minimum wage rate, or the State minimum wage rate. *See* 20 CFR 655.120(b)(3). Similarly, when the AEWR is updated during a work contract and is lower than the wage rate that is guaranteed on the job order, the employer must continue to pay at least the wage rate guaranteed on the job order. *See* 20 CFR 655.120(b)(4).

On February 28, 2023, DOL published a final rule, *Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States*, 88 FR 12760 (Feb. 28, 2023), to establish a new methodology for setting hourly AEWRs, effective March 30, 2023. Pursuant to this new rule, while most AEWRs will continue to be based, as they have been since 1987, on the United States Department of Agriculture's (USDA) Farm Labor Survey (FLS), these new OEWS-based AEWRs will apply to H-2A job opportunities classified: (1) in SOC codes other than the six SOC codes comprising the field and livestock workers (combined) group, and (2) in the field and livestock workers (combined) occupational group that are located in States or regions, or equivalent districts or territories, for which the United States Department of Agriculture's Farm Labor Report (better known as the FLS) does not report a wage.

The new final rule requires the OFLC Administrator to publish a *Federal Register* notice at least once in each calendar year to establish each AEWR. *See* 20 CFR 655.120(b)(2). The OFLC Administrator provides this notice by publishing two separate announcements in the *Federal Register*, one to update the AEWRs based on the wage data reported by the USDA's FLS, effective on or about January 1, and a second to update the AEWRs based on data reported by the BLS OEWS survey, effective on or about July 1. *See* 88 FR at 12775.

### **OEWS-based AEWR Updates**

In accordance with 20 CFR 655.120(b)(1)(ii), AEWRs for agricultural employment not represented by the six SOC codes comprising the field and livestock worker (combined) group<sup>2</sup> for which temporary H-2A certification is being sought is determined using the statewide annual average hourly gross wage for the SOC code for the State, or equivalent district or territory, as reported by the OEWS survey. In the event the OEWS survey does not report an average hourly gross wage for the SOC code for the State, or equivalent district or territory, the AEW is determined using the national average hourly gross wage for the SOC as reported by the OEWS survey.

Using the most recently published OEWS survey,<sup>3</sup> the OFLC Administrator is publishing the statewide hourly AEWs applicable to H-2A job opportunities classified using an SOC code not included in the field and livestock workers (combined) group.<sup>4</sup> The hourly AEWs determined under 20 CFR 655.120(b)(1)(ii) are available for each SOC code and geographic area at the following URL: <https://flag.dol.gov/>. At the URL, DOL provides a searchable spreadsheet and other resources that enable interested parties to search by State and SOC code for the OEWS-based AEW applicable to an H-2A job opportunity.

In addition, where the FLS survey does not report an annual average gross wage for the field and livestock workers (combined) group in a State or region, or equivalent district or territory, the AEWs applicable to the field and livestock workers (combined) group is established using the statewide annual average hourly gross wage for the field and livestock workers (combined) group in the State, or equivalent district or territory, as reported by the OEWS survey. *See* 20 CFR 655.120(b)(1)(i)(B). In the event the OEWS survey does not report a

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<sup>2</sup> The FLS survey's field and livestock workers (combined) category reports aggregate wage data for the following six SOC titles and codes: Farmworkers and Laborers, Crop, Nursery and Greenhouse Workers (45–2092); Farmworkers, Farm, Ranch, and Aquacultural Animals (45–2093); Agricultural Equipment Operators (45–2091); Packers and Packagers, Hand (53–7064); Graders and Sorters, Agricultural Products (45–2041); and All Other Agricultural Workers (45–2099).

<sup>3</sup> *See* Bureau of Labor Statistics, Occupational Employment and Employment and Wage Statistics (OEWS) Report, OEWS Databases (Apr. 25, 2023), *available at* <https://www.bls.gov/oes/data.htm>. Note that the 2023 OEWS report is based on data from May 2022 OEWS estimates.

<sup>4</sup> *See* 20 CFR 655.120(b)(1)(iii) (“For purposes of paragraphs (b)(1)(i) and (ii) of this section, the term State and statewide include the 50 States, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands.”)

statewide average hourly gross wage for the field and livestock workers (combined) group for the State, or equivalent district or territory, the AEW is determined using the national average hourly gross wage for field and livestock workers (combined) group as reported by the OEWS survey. *See* 20 CFR 655.120(b)(1)(i)(C).

Using the most recently published OEWS survey, the OFLC Administrator is publishing the hourly AEWs applicable to H-2A job opportunities classified in the field and livestock workers (combined) group, in States or regions, or equivalent districts or territories, where an annual average hourly gross wage is not reported by the FLS. These hourly AEWs are available at <https://flag.dol.gov/> and in the table below:

Table—Adverse Effect Wage Rates for Field and Livestock Workers (Combined)

**State/District/Territory AEWs**

Alaska	\$18.02
District of Columbia	\$20.72
Guam	\$10.12
Puerto Rico	\$9.70
U.S. Virgin Islands	\$13.95

**Authority:** 20 CFR 655.120(b)(2); 20 CFR 655.103(b).

**Brent Parton,**

*Acting Assistant Secretary for Employment and Training, Labor.*

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